IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

WRIT PETITION NO.5913 OF 2004
ALONG WITH
WRIT PETITION NOS.5922, 5923, 5924 AND 6040 OF 2004

WRIT PETITION NO.5913 OF 2004

Nicholas Employees Union).. Petitioner

Versus

Nicholas Piramal (India) Ltd. & ors.).. Respondents

Mr.S.K.Talsania with Mr.K.S.Bapat for the Petitioner.

Mr.J.P.Cama with Mr.Bharat Goyal and Ms.Bharucha i/b. M/s.Haresh Mehta & Co. for the Respondents.

ALONG WITH
WRIT PETITION NO.5922 OF 2004

Sanjay M. Apte).. Petitioner

Versus

Nicholas Piramal (India) Ltd. & ors.).. Respondents

Mr.Arshad Shaikh with Mr.Vinod Shetty i/b.Ms.Ketaki Rege for the Petitioner.

Mr.J.P.Cama with Mr.Bharat Goyal and Ms.Bharucha i/b. M/s.Haresh Mehta & Co. for the Respondents.

ALONG WITH
WRIT PETITION NO.5923 OF 2004

Roche Anglo-French Employees' Union).. Petitioner

Versus

Nicholas Piramal (India) Ltd.& ors.).. Respondents

Mr.Arshad Shaikh with Mr.Vinod Shetty i/b.Ms.Ketaki Rege for the Petitioner.

Mr.J.P.Cama with Mr.Bharat Goyal and Ms.Bharucha i/b.

M/s.Haresh Mehta & Co. for the Respondents.

ALONG WITH
WRIT PETITION NO.5924 OF 2004

Boehringer Mannheim India Employees' Union).. Petitioner

Versus

Nicholas Piramal (India) Ltd. & ors.).. Respondents

Mr.Arshad Shaikh with Mr.Vinod Shetty i/b.Ms.Ketaki Rege for the Petitioner.

Mr.J.P.Cama with Mr.Bharat Goyal and Ms.Bharucha i/b. M/s.Haresh Mehta & Co. for the Respondents.

AND
WRIT PETITION NO.6040 OF 2004

Syed Tanvir Haider Naqvi).. Petitioner

Versus

Nicholas Piramal (India) Ltd. & ors.).. Respondents

Mr.Arshad Shaikh with Mr.Vinod Shetty i/b.Ms.Ketaki Rege for the Petitioner.

Mr.J.P.Cama with Mr.Bharat Goyal and Ms.Bharucha i/b. M/s.Haresh Mehta & Co. for the Respondents.

CORAM: SMT.NISHITA MHATRE, J.

DATED: 17TH AUGUST 2004

P.C.:

. These Writ Petitions arise from a common order passed by the Industrial Court, Mumbai refusing interim relief to the Petitioners. The interim relief sought by the Petitioners in all five Complaints is of staying the transfer orders issued to the Medical Representatives employed by Respondent No.1 in all the Petitions. The Writ Petitions are being disposed of finally at the

stage of admission with the consent of all the parties to the Petitions.

2. Writ Petition No.5913 of 2004 arises from Complaint (ULP) No.486 of 2003 filed by Nicholas Employees' Union. Writ Petition No.5922 of 2004 arises out of Complaint (ULP) No.483 of 2003 filed by one of the transferees and Roche Anglo French Employees Union. Writ Petition No.5923 of 2004 arises out of Complaint (ULP) No.565 of 2003 filed by Roche Anglo-French Employees' Union. Writ Petition No.5924 of 2004 arises out of Complaint (ULP) No.564 of 2003 filed by Boehringer Mannheim India Employees' Union. Writ Petition No.6040 of 2004 arise out of Complaint (ULP) No.492 of 2003 filed by one of the transferees and Roche Anglo French Employees Union. The interim relief sought in all the Complaints is the same. The prayers are as follows :

> "3(a)(1) That the pending the hearing and final disposal of the main complaint, the Respondents be restrained from changing the designations of the concerned employees from Medical Representatives (MRs) to Business Development Managers (DBMs) and the Respondents further restrained from changing the salary structure, allowance, wages, working place, territories etc. of any of the employees covered by the complaint without complying with mandatory provisions U/s.9(A) and 33 of the I.D.Act, 1947,
>
> (i) Giving any effect to the Orders of Transfer dated 20th June 2003 issued to the Medical Representatives.

(ii) Proceeding with any disciplinary action against the said Medical Representatives for their not reporting at the place of transfer.

(iii) From transferring any of the employees save and except with the prior permission of this Hon'ble Court.

Ad-Interim Reliefs in terms of prayer clause (a) hereinabove."

3. The Complaints were filed sometime in July 2003 when the transfer orders were issued. Surprisingly, the Industrial Court did not bother to dispose of the interim relief applications for almost one year. The roznamas in the Complaints which have been called for indicate that adjournments have been sought and granted on several occasions without any rhyme or reason. The Industrial Court while deciding the interim relief applications should take care to dispose them of at the earliest possible dates. The Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 stipulates that the Complaints itself should be disposed of in six months. There is no doubt that there is a large volume of work which the Member of the Industrial Court has to handle, but to allow interim relief applications to linger on for almost a year is, to my mind, unpardonable.

4. Respondent No.1- M/s.Nicholas Piramal (I) Ltd. - in all the Writ Petitions is the parent Company in which

several other Companies have been amalgamated; the other Companies being Rhone Poulenc, Boehringer Mannheim India Ltd., and Roche Products Ltd. On 7th May 2003, N.B.Gad, President - Mktg. and Org. Dev. of the Respondent Company, issued a letter to all Medical Representatives (hereinafter for the sake of brevity referred to as "MR(s)) in the Multi Speciality Division applauding their performance. It was mentioned in this letter that over 300 MRs had qualified for a trip to Bangkok in view of their performance. 300 "star performers" were informed that some of their colleagues had not raised their performance levels and consequently 3 MRs from Andhra Pradesh and 8 MRs from Delhi were terminated from service. About a month and half later, the same person issued another letter to all the MRs in the Multispecialities Division informing them that performance of 100 MRs was found to be below the national average; that there was congestion in the markets and that the management had been unsuccessful in improving the productivity and performance of these MRs, despite its best efforts. A decision was, therefore, taken by the management to provide 42 MRs a new environment which would entail a change of location/transfer. Accordingly, transfer orders were issued to about 42 MRs all over India. These MRs were working in various territories and had been transferred to other territories in India. It appears that these

transfers were preceded by letters to the MRs calling upon them to accept a promotional grade newly introduced from 1st July 2003 as Business Development Managers (hereinafter for the same of brevity referred to as "BDM") in the management cadre. This grade was ostensibly introduced in order to benefit the MRs. It appears that the MRs not having accepted these so-called promotions, were then subjected to transfers. There is no dispute that the MRs are appointed in Mumbai and sent to various locations all over India. There is also no dispute that the salary of these MRs is also remitted from Mumbai. The dearness allowance payable is based on the consumer price index in Mumbai. The Petitioners, therefore, filed Complaints under Items 3 and 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as "the Act"). The contention raised in the Complaints was that the transfer was mala fide and that the Company had not implemented the agreements with the Union under which it was incumbent upon the Company to consult the MRs before reallocating them to another territory. Interim relief applications were also filed in the Complaints supported by affidavits.

5. No issue regarding jurisdiction was framed by the Industrial Court, although the Company had raised this

as a preliminary objection. Despite this, the Industrial Court observed that evidence would have to be recorded to ascertain whether it had jurisdiction to decide the Complaints. With regard to other issues as to whether there was, prima facie, an unfair labour practice committed by the employer under Items 3 and 9 of Schedule IV of the Act, the Industrial Court held that it was not possible to decide unless evidence is led. While rejecting the applications, the Industrial Court observed thus:

> "As observed in the order the complainant union is at liberty to pursue the cases of the employees to whom the inconvenience is caused due to the transfer, by making the written representation to the respondent company".

This observation of the Industrial Court is difficult to understand. The Union has approached the Industrial Court only because the Company has not acceded to their demands to stay the transfer orders. What further representation can be made by a Union in such circumstances is not understood.

6. The approach of the Industrial Court, to my mind, is one of shirking responsibility. Based on the material before it, the Industrial Court is expected to decide whether it has jurisdiction and then whether a prima facie case has been made out by the Complaint. The Industrial Court cannot decide the interim relief applications by stating that evidence would have to be

led in order to decide whether the Complainant is entitled to any relief. One would expect the Industrial Court to decide on the basis of the documents and material on record as to whether the Complainant had successfully established a prima facie case to grant interim relief. If no such case had been established by the Complainant, obviously the Industrial Court would be well within its jurisdiction to reject the application, but to reject an application because evidence would have to be led on the various issues, to my mind, amounts to avoiding responsibility. The Industrial Court ought to have considered these aspects rather than making gratuitous and unwarranted remarks about irresponsible trade unions, when it was not the case of the Company that the trade unions in the present Writ Petitions had acted in such a manner.

7. In the present case, although the Company had raised the issue regarding jurisdiction as a preliminary objection, the Industrial Court has not cared to frame such an issue. Mr.Cama, learned Counsel appearing for the Respondent Company, relied on the judgment of this Court in the case of *Municipal Corporation of City of Amravati* vs. *Ashok Ramkrishna Kamble and* **others**, **1994 II CLR 180**, where it has been held that the Industrial Court must decide the question of jurisdiction as a preliminary issue when such an issue is raised. In

fact, the learned Single Judge of this Court (Nagpur Bench) has gone so far as to say that the Industrial Court, *suo motu*, should decide the question of jurisdiction as a preliminary issue. In the said case the employer had not contended before the Industrial Court that it had no jurisdiction and the issue was raised for the first time before this Court. It was in those circumstances that this Court remanded the matter to the Labour Court to decide the issue of jurisdiction as a preliminary issue. In the present case, I am of the view that it is not necessary to remand the matter only for deciding the jurisdictional question as the Industrial Court, it appears has proceeded on the footing that prima facie it has jurisdiction and, therefore, it has dealt with the interim relief applications.

8. There is no dispute that all appointment letters to the MRs are issued from Mumbai. Undisputedly, the salary is remitted from Mumbai and dearness allowance is paid on the consumer price index of Mumbai. The decision to transfer the MRs was taken in Mumbai. However, the transfer orders which were communicated to the MRs have been issued by the Zonal Managers at various places. (The Company on the basis of the transfer orders being issued by the Zonal Managers in various places in India, contends that the Complaints

are not maintainable.) Furthermore, three References have been made for adjudication to the Industrial Tribunal at Mumbai. The first Reference arises out of a notice issued under Section 9A of the Industrial Disputes Act, 1947 (hereinafter referred to as "ID Act") by the Company. The other two References have been made on account of the demands raised by the MRs. The maintainability of these References has not been challenged by the Company. Furthermore, the Company itself in August 2003, immediately after the transfer orders, has filed a Complaint being Complaint (ULP) No.557 of 2003 under Items 1 and 5 of Schedule III of the Act against all four Unions functioning in the Company who are the Petitioners herein as well as the Federation of Medical and Sales Representatives Association of India. The Complaint was filed because the Union had given a call to all the MRs in various territories all over India to proceed to Mumbai for attending a Convention to be held on 14th/15th August 2003 for staging demonstrations and dharna. The Company has also obtained an interim order on 14th August 2003 under which the Respondents in that Complaint were directed to demonstrate peacefully at a distance of 30 feet from the premises of the Company. Certain other orders restraining the members of the Unions have also been passed by the interim order of 14th August 2003. Obviously, therefore, the Company has chosen to raise

this bogey of there being no jurisdiction in the Industrial Court only with a view to defeat the present Complaints. In my view, therefore, prima facie, the Industrial Court has jurisdiction to decide the Complaints and to pass interim orders.

9. The submission of Mr.Talsania, learned Counsel appearing for the Petitioners in Writ Petition No.5913 of 2004 will now have to be considered. He submits that under the Agreement of 19th May 1995 entered into between the company and Nicholas Employees' Union, territorial reallocation of an MR could be done only after the consultation with the MR concerned. All MRs in the pool territories were to be consulted before reallocation. He submits that admittedly no such consultation has been effected and, therefore, the transfer orders are in breach of the Agreement. This, according to him, attracts the provisions of Item 9 of Schedule IV of the Act. He further contends that under Clause 26 of the work norms applicable to MRs, an MR who desires a transfer from the base of operation is directed to make an application to the Company and after the consultation with the Union, the transfers are to be effected. He submits that no such action has been undertaken by the Company and for this reason also the transfers effected are bad in law. For establishing that prima facie the transfers are mala fide,

Mr.Talsania relies on the letters issued by Gad indicating that in May 2003 all the MRs except 11 were applauded for their work; the services of these 11 MRs were terminated on account of their not achieving the required performance. He also submits that the fact that the remaining MRs had not accepted the post of BDMs as directed by the Company, had irked it and therefore it decided to transfer 42 MRs. This, according to Mr.Talsania, was in keeping with the intention apparent in the Annual Report of 2003-2004 and six monthly report of 2003 to deunionise the Divisions. Further, he submits that the criss-cross transfers have been effected by the Company by transferring some MRs out of various States and bringing others into the same State. The transfers, according to the learned Counsel, could not be on account of congestion in territories as stated in the letter of 26th June 2003 but were obviously because of the mala fide intention of the Company. He, therefore, submits that the MRs have made out a prima facie case for granting interim reliefs.

10. Mr.Shaikh, learned Advocate for the Petitioners in all the other Writ Petitions, while adopting the arguments of Mr.Talsania, submits that the transfers effected are obviously mala fide since the individuals have been transferred from one linguistic zone to another. He submits that MRs who had admittedly not

been transferred for over thirty years had established a rapport with both the Doctors and Chemists in their respective territories. According to him, it would be difficult for an MR who was always stationed in the Hindi speaking belt to work in a non-Hindi speaking belt, especially in South India, as communication with the Chemist would always be a problem. He submits that the mala fide intention of the Company is absolutely apparent; they wanted to get rid of the unionised staff by introducing a new grade of BDM, ostensibly being a managerial grade. He submits that the work which a BDM was required to perform was the same as that of an MR and it was only with a view to avoid the labour laws that the category of BDM was introduced. The learned Advocate also submits that when the References were pending adjudication, the Company could not have transferred the MRs without following the provisions of Section 33(1)(a) of the ID Act read with Item 11 of Schedule IV of the ID Act. He submits that it was incumbent on the Company to give a notice of change under Section 9A of the ID Act, prior to transferring the MRs, since there was to be a reduction in the number of workmen in the territory which would cause prejudice not only to those transferred but also to those who were retained in the territory. Both the learned Advocates submit that the Industrial Court has not applied its mind at all to the various documents on record by

observing that it was necessary for further evidence to be led before any interim relief could be granted to the Complainant.

11. Mr.Cama, learned Counsel for the Company in all the Writ Petitions, submits that the Company was not required to consult the Unions prior to transferring an employee from his headquarters. It was only if the territory was being changed that the employer had to consult the Union. According to Mr.Cama, the transfer made from one headquarters to another could be made well within the powers of the Company. The MRs were aware that such a power existed as the appointment letters included a condition of service of transfer from one headquarter to another for which there was no need to consult either the Union or the affected MR. He submits that Clause 17 of the Agreement relied on by the Petitioners is inapplicable since the Company had in fact transferred the MRs from one headquarters to another. He relies on the documents on record to indicate that there was no compulsion on the MRs to accept the post of BDM. He submits that the Industrial Court has rightly not granted any interim relief because there was insufficient evidence on record. He submits that the Industrial Court cannot be faulted for being cautious and for wanting further evidence in order to decide whether the Complainants could be granted any

relief in the Complaint. The learned Counsel relies on the judgments in the case *Syndicate Bank Ltd.* vs. *Its workman*, **1966 I LLJ 440**, *Management of Addisons Paints and Chemicals Ltd.* vs. *Workmen represented by the Secretary (A.P. and C) Assistants' Association and another*, **JT 2001 (1) SC 26**, *National Hydroelectric Power Corporation Ltd.* vs. *Shri Bhagwan and another*, **(2001) 8 SCC 574** and *Shivaji A. More* vs. *Estate Manager, Maharashtra State Farming Corporation Ltd. and another*, **1996 (2) FLR 447**, to urge that transfer is a condition of service and Courts should not readily interfere when the management decides to transfer an employee. He contends that the orders of transfer have been issued by the Company in discharge of its managerial functions and these should not be interfered with lightly by any Court. The learned Advocate submits that in reply to the submission made by Mr.Shaikh that linguistic zones have been changed on account of transfer, that it was the best person possible who was transferred for the work available in a particular territory. According to the learned Counsel, "base of operation" is synonymous with "headquarters". These bases of operation or headquarters are in various different zones. The bases of operation or headquarters consist of several territories and it is only when the territory is to be changed that there needs to be consultation with the Union. When there is a change in the base of operation

or headquarter, there is no need to consult with the Union as the appointment letter has a condition that the MRs would be subjected to transfer from one base to another. Therefore, according to the learned Counsel, the Industrial Court has committed no error by not granting any interim relief.

12. A specimen appointment letter is annexed to the Petition. This indicates that the power to transfer exists with the management. However, such a power is circumscribed by the various Agreements, Understandings, Settlements, etc. with the Union. The appointment letter produced on record shows that power to transfer is incorporated in Clause 4 of the terms and conditions of service, under which the services of the MRs are subject to transfer in any Division of the Company anywhere in India at the sole discretion of the management. (Emphasis supplied). This power is circumscribed by the Agreement entered into between the Company and the Union in 1995. Clause 17 requires the Union to be consulted if there is going to be a change in the territory. Furthermore, the transfer orders which have been issued to the individual employees indicate that the base of operation has been changed. Mr.Cama was categoric that the term "base of operation" and the "headquarters" was synonymous. The power to transfer as contained in the appointment letter is the

power to transfer from one Division of the Company to any other Division in India, at the sole discretion of the management. When the base of operation is changed, obviously it would entail a change in the territory. Therefore, Clause 17, prima facie, would be attracted. In fact, when an MR desires to have his base of operation changed i.e. his headquarters changed, he has to make an application to the Company. It is only if the Union recommends the transfer, the Management can take a decision about the transfer after consultation with the Union at the zonal level. Obviously, therefore, when the headquarters are changed, there is definitely a change in the territory. If there is a change in the territory, prima facie, Clause 17 is attracted and there must be a consultation with the Union or the concerned MR. Since admittedly there has been no consultation, Item 9 of Schedule IV of the Act is attracted. According to Mr.Cama for the Respondent Company, the Companies which have been amalgamated into the first Respondent i.e. Nicholos Piramal (India) Ltd. are considered as seperate Divisions. Obviously, therefore, the transfer of an MR from one Division to another can be effected at the sole discretion of the management. Prima facie, therefore, there is an unfair labour practice under Item 9 of Schedule IV of the Act.

13. In order to decide whether the transfers are mala

fide, one will have to consider certain documents on record and the circumstances leading to the transfers. Prima facie, it appears that these transfers have been effected because the MRs rebuffed the offer of the post of BDM. The post of BDM, prima facie, appears to be that of a glorified MR in the managerial cadre. The intention of the Company to do away with the Unionised staff is amply brought forth in the Annual Report of the Company for 2003-2004 and in the Sixth Monthly Report ending on September 30, 2003, where the Company has stated that it had successfully revamped the Respiratory and Multispeciality Divisions, increasing their flexibility and productivity by reducing the Unionised field force from 42% to 16%. In keeping with this avowed object of deunionising the Multispeciality Division, the Company had dangled the carrot to the MRs for accepting the post of BDM. Enraged by the MRs refusal to bite the bait, the Company has issued the transfer orders.

14. The submission of Mr.Shaikh that there was no need to transfer people from one linguistic zone to another also needs consideration in view of the fact that an MR is required to establish a rapport not only with the Doctors but also with the Chemists. Communication with a Chemist would require the MR to be familiar with the local language. Mr.Cama’s submission that the best

possible person has been transferred to the various territories also cannot be accepted as the letter of 26th June 2003 issued by Gad indicates that these persons have been transferred for decongestion in the territories and because they were not found suitable and their productivity was at a low ebb. Obviously, therefore, the transfer orders appear to be mala fide, prima facie.

15. There can be no quarrel with the submission of Mr.Cama that transfer is an incident of service, that the management has a right to transfer an employee and that the managerial decision to transfer an employee should not be interfered with lightly by Court. However, all the judgments cited by him in support of this submission indicate that although the employer has a right to reorganise his business and effect a transfer which would be a managerial function, the exercise of such a right or power should not be considered a legal exercise of power if it is actuated by mala fides. Prima facie, there appears to be mala fides writ large on the transfers effected by the Company. Therefore, the submission of the Petitioners will have to be accepted and interim relief granted.

16. Mr.Cama submits, as a last resort, that this Court should not interfere with interim orders under Article

226 of the Constitution of India, as held by the Apex Court in the case of *Ranjeet Singh* vs. *Ravi Prakash*, **(2004) 3 SCC 682**, which decision has been followed by a learned Single Judge of this Court in the case of *Johnson & Johnson Employees' Union and others* vs. *M/s.Johnson & Johnson Ltd. and others* (**Writ Petition No.1312 of 2004**). There can be no doubt that the High Court in exercise of its powers under Articles 226 and 227 of the Constitution of India can interfere with the findings of a subordinate Tribunal when there is an error apparent on the face of the record and that error must be self-evident. The error in the judgment of the Industrial Court is self-evident as he has refused to grant interim relief only because of insufficiency of evidence and oral evidence being required. The documents produced before me which admittedly were available before the Industrial Court, prima facie, do indicate that an unfair labour practice has been committed. The Industrial Court has not exercised its jurisdiction by deciding the issue and has merely rejected the applications on the basis of insufficiency of evidence. The submission of Mr.Cama that the Industrial Court cannot be faulted for taking such a view or adopting such a practice is unsustainable. After allowing the interim applications to linger on for almost a year and despite permitting the parties to file affidavits and various documents, it is surprising that

the Industrial Court was not able to decide one way or the other. Although the order is prolix, the Industrial Court has failed to arrive at a conclusion as to whether the Petitioners had succeeded in establishing, prima facie, that the Company had indulged in unfair labour practices under Items 3 and 9 of Schedule IV. If the Industrial Court found that there was no prima facie case made out, he could have disallowed the application on that basis. To reject an application on the ground that there was insufficient evidence, to my mind, would mean that the Industrial Court has failed to exercise its jurisdiction. Such an error is apparent on the face of the record and can be corrected by this Court under Article 226 of the Constitution of India.

17. The interim relief applications filed before the Industrial Court, Mumbai in the Complaints will, therefore, have to be allowed. The transfer orders issued by the Company and challenged in the Complaints are stayed.

18. Writ Petitions allowed.

19. The original Roznamas called for by this Court to be returned to the Industrial Court, Mumbai forthwith.

20. Ms.Sonali Kunekar i/b.M/s.Haresh Mehta & Co.

appearing for the Company seeks stay of the order. Mr.Bapat strongly opposes any stay being granted. Mr.Shaikh submits that no stay should be granted since the Company is contemplating disciplinary action against the workmen. In these circumstances, the stay sought for by the Company is refused.

21. Parties may be provided authenticated copy of this order.